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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of) CC Docket No. 97-158
Southwestern Bell Telephone Company)
Tariff F.C.C. No. 73) Transmittal No. 2633

OPPOSITION TO DIRECT CASE

GST Telecom, Inc. ("GST"), by its undersigned counsel, hereby submits its opposition to the *Direct Case* filed by Southwestern Bell Telephone Company ("SWBT") pursuant to the *Order Designating Issues for Investigation* ("*Designation Order*") released on July 14, 1997 in the above-captioned proceeding. GST, through its wholly-owned operating companies, is a non-dominant provider of competitive access and competitive local exchange services in the southwestern and western United States.

I. INTRODUCTION

The Federal Communications Commission ("Commission") seeks comment on SWBT's Transmittal No. 2633 which proposes to add to SWBT's interstate access tariff a new Section 29, entitled Request for Proposal ("RFP"). This new Section includes SWBT's responses to customer RFPs submitted to it in "competitive bid situations." SWBT seeks permission to offer access services to AT&T Corp. ("AT&T") and Coastal Telephone Company ("Coastal") at rates below its otherwise tariffed rates for "like" services. GST opposes SWBT's Transmittal No. 2633 because it violates several Commission rules and policies in addition to threatening the development of competition in the access service market. Specifically, Transmittal No. 2633 fails to comply with the Commission's long standing requirement that dominant LECs offer averaged rates throughout their individual study areas. Not only does Transmittal No. 2633 fail to comply with this long

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standing requirement, but it also fails to fall within any Commission adopted exception. Transmittal No. 2633 blatantly violates the Commission's policy prohibiting dominant LECs from offering contract tariff in addition to violating the Commission's *DS-3 ICB* Order which restricts tariff offerings on an individual case basis by dominant carriers.

Finally, the Commission's policy to refrain from applying the competitive necessity doctrine to dominant carriers should continue. Commission regulation is still necessary to protect markets not competitively developed from anticompetitive behavior by dominant carriers. Therefore, the competitive necessity defense should not be available to SWBT. Even if such a defense were available, SWBT's Transmittal No. 2633 fails to meet it. For these reasons, GST respectfully urges the Commission to reject SWBT's Transmittal No. 2633 in this proceeding.

II. TRANSMITTAL NO. 2633 VIOLATES THE COMMISSION'S POLICY PROHIBITING DOMINANT LECS FROM OFFERING CONTRACT TARIFFS

The *Designation Order* seeks comment on whether "Transmittal No. 2633, as a tariff initiated by a LEC to respond to a competitor's offer to an end user, would appear to meet the Commission's definition of an RFP tariff that is prohibited under the Commission's current policy."^{1/} SWBT's Transmittal No. 2633 is clearly a contract tariff under the Commission's definition. As a contract tariff, the transmittal must be rejected since dominant carriers are prohibited from offering contract tariffs under the Commission's current policy.^{2/}

^{1/} *Designation Order* at para. 18.

^{2/} In its Order, the Commission confirmed that its policy prohibits both contract and RFP tariff offerings by LECs. *Designation Order* at para 18.

A. Dominant Carriers are Prohibited from Offering Contract Tariffs.

SWBT attempts to argue that the Commission's current policy does not prohibit dominant LECs from offering RFP tariffs or contract tariffs. It claims the Commission has never specifically found that dominant LECs may not offer contract tariffs.^{3/} SWBT fails to recognize that the definition of contract tariffs is *restricted* to interexchange carriers ("IXCs") and non-dominant carriers. In other words, *by definition*, a dominant carrier cannot offer a contract tariff. Section 61.3(m) of the Commission's rules defines contract tariff as a "tariff based on a service contract entered into between an interexchange carrier . . . or a non-dominant carrier and a customer."^{4/} The Commission confirms that "*by definition, a dominant LEC may not offer a contract tariff.*"^{5/}

B. Transmittal No. 2633 is a Contract Tariff.

SWBT's claim that it did not file its RFP tariff as a contract tariff is without merit. Under the plain facts, Transmittal No. 2633 is a contract tariff, regardless of how SWBT tries to label it. Section 61.55 of the Commission rules defines what constitutes a contract tariff and SWBT's Transmittal No. 2633 meets that definition.^{6/} First, SWBT Transmittal No. 2633 establishes a term of 36 months for the contract, including a renewal option to extend the service for two additional years.^{7/} Second, Transmittal No. 2633 includes a brief description of each of the services offered to

^{3/} SWBT *Direct Case* at 3.

^{4/} 47 C.F.R. §61.3(m).

^{5/} *Designation Order* at para 17.

^{6/} 47 C.F.R. § 61.55.

^{7/} SWBT FCC Tariff No. 73, at Original Page 29-5 and 29-6.

AT&T and Coastal.^{8/} Third, Transmittal No. 2633 sets minimum volume commitments for each service.^{9/} Fourth, Transmittal No. 2633 contains the contract price for each service or services at the volume levels committed to by the customers. Fifth, a general description of the volume discounts is built into the contract rate structure. Finally, a general description of other classifications, practices and regulations affecting the contract rate are included. SWBT's tariff contains all the elements of a contract tariff. SWBT's "RFP" tariff is clearly a contract tariff.

Furthermore, as noted by the Commission, a competitive response or RFP tariff is "a *contract tariff* that a LEC initiates when it responds to a competitor's offer to an end user, or in response to a request for proposal."^{10/} SWBT's tariff clearly provides two individualized responses to two carriers' specific RFPs. SWBT's Transmittal 2633 is a contract tariff and therefore must be rejected by the Commission.

III. TRANSMITTAL NO. 2633 VIOLATES THE DS-3 ICB ORDER'S RESTRICTION ON TARIFF OFFERINGS ON AN INDIVIDUAL CASE BASIS BY DOMINANT CARRIERS

The *Designation Order* seeks comment on whether Transmittal No. 2633 is an individual case basis ("ICB") tariff and whether such a finding would compel a rejection of the transmittal, assuming a rejection of SWBT's competitive necessity argument.^{11/}

Through its Transmittal No. 2633, SWBT attempts to provide ICB pricing to AT&T and Coastal in response to those carriers' RFPs submitted to SWBT. The Commission has defined ICB

^{8/} *Id.* at 5th Revised Page 29-2, 6th Revised Page 29-4, and Original Page 29-6.

^{9/} *Id.* at 6th Revised Page 29-4 and Original Page 29-6.

^{10/} *Designation Order* at para 18.

^{11/} *Designation Order* at para. 22.

pricing as a term usually used “when a carrier adopts a practice of developing a price for a particular service or facility in response to each customer request for the service or facility.”^{12/} SWBT’s claim that it did not file its Transmittal No. 2633 as an ICB tariff is a play on semantics.^{13/} SWBT cannot deny that the *de facto* result of its transmittal is an ICB offering. As Sprint points out, “because the rates are bundled for all the facilities required by the RFPs and because the rates are available only to customers ‘requesting the same service in the same quantities at the same Central Office(s),’ the proposed rates are clearly available only to the customers issuing the RFPs.”^{14/} The rates proposed by SWBT in Transmittal No. 2633 are far below SWBT’s otherwise-applicable tariffed rates. In the *DS-3 ICB Order*, the Commission found the practice of offering the same access service at both ICB and averaged prices to be unreasonably discriminatory.^{15/} Because the discrepancy between the ICB rate and the averaged rate is unlawfully discriminatory and in violation of the Commission’s *DS-3 ICB Order*, the Commission must reject Transmittal No. 2633.

IV. TRANSMITTAL NO. 2633 VIOLATES SECTION 69.3(e)(7) OF THE COMMISSION’S RULES REQUIRING DOMINANT LECs TO OFFER AVERAGED RATES THROUGHOUT THEIR INDIVIDUAL STUDY AREAS

The *Designation Order* seeks comment on whether Transmittal No. 2633 violates Section 69.3(e)(7) or 69.123(c) of the Commission’s rules.^{16/} SWBT attempts to argue that Transmittal No.

^{12/} *Local Exchange Carriers Individual Case Basis DS-3 Service Offerings*, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989)(“*DS-3 ICB Order*”).

^{13/} SWBT’s *Direct Case* at 3.

^{14/} *Sprint Petition to Reject, or Alternatively Suspend and Investigate* at 2.

^{15/} *DS-3 ICB Order*.

^{16/} *Designation Order* at para. 23.

2633 meets the competitive necessity doctrine, an exception to Section 69.3(e)(7). As demonstrated below, this argument fails.

The Commission's rules require geographically averaged rates throughout a LEC's study area to prevent LECs from unreasonable discriminatory pricing.^{17/} Transmittal No. 2633 deviates from this general rule and fails to comply with any exception to the rule adopted by the Commission.^{18/} Therefore, SWBT's Transmittal No. 2633 proposal to offer below-averaged rates to AT&T and Coastal is in direct violation of Section 69.3(e)(7).

V. THE COMPETITIVE NECESSITY DOCTRINE DOES NOT APPLY TO SWBT

The *Designation Order* requires SWBT to explain why the competitive necessity doctrine should be available to dominant LECs as a defense to discrimination.^{19/} As demonstrated below, SWBT fails to provide a substantive reason why the competitive necessity doctrine should apply to dominant LECs.

SWBT's arguments supporting application of the competitive necessity doctrine to dominant LECs are entirely unpersuasive.^{20/} SWBT attempts to argue that the Commission has no choice but to apply the competitive necessity doctrine to dominant LECs since the Commission refrained from finding that the doctrine did not apply in a previous decision. To refrain means to forbear, to do nothing. Doing nothing does not translate into a decision. The fact that the Commission did not

^{17/} 47 C.F.R. § 69.3(e)(7).

^{18/} The Commission has adopted narrow exceptions to this general rule which include ICB tariffs, contract tariffs and zone density pricing.

^{19/} *Designation Order* at para. 24.

^{20/} *SWBT Direct Case* at 5.

address the applicability of the competitive necessity doctrine in past decisions does not preclude it from addressing that issue now, if necessary.

Even if the Commission found that the competitive necessity doctrine applied to dominant LECs, SWBT fails to meet any of the criteria. The competitive necessity test, as set forth by the Commission in the *Private Guidelines Order* and as cited by the Commission in its *Designation Order*, states that “[a] carrier’s proof (of competitive necessity) should include a showing that (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users.”^{21/} This test has been upheld on appeal by the Second Circuit Court as consistent with the Interstate Commerce Commission’s determination that the competition must be “genuine and not a pretense.”^{22/}

The competitive necessity test is the standard for competition and SWBT has failed to meet it. With respect to the first criteria, SWBT cannot confirm with any certainty the existence of competition from other vendors in a given RFP. SWBT claims that “the issuance of one RFP should be sufficient to determine that competition exists for purposes of the competitive necessity test.”^{23/} Such a benchmark would render the standard ineffectual and useless.

^{21/} *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C.2d 923, 948 (1984).

^{22/} *American Tel. and Tel. Co. v. Federal Communications Comm’n*, 449 F.2d 439, 450 (2nd Cir. 1971).

^{23/} *SWBT Direct Case* at 11.

In its initial filing of Transmittal No. 2633 with the Commission, SWBT cited GST and Teleport tariffs as evidence of the existence of lower priced competitive alternatives. The *Designation Order* specifically noted that the production by SWBT of the GST and Teleport tariffs failed to substantiate SWBT's point and, therefore, required explanation.^{24/} Not only does SWBT fail to provide an explanation in its *Direct Case*, but it does not reproduce the GST and Teleport tariffs. It appears that on reconsideration, SWBT found that the evidence did not support its case.

In its *Direct Case*, SWBT produces two tariffs to substantiate its claim that lower priced alternatives are available. This evidence fails to prove that a competitive alternative exists for the basket of services offered by SWBT to AT&T and Coastal. In addition, this evidence also fails to prove that the services are *generally available* to customers as required by the doctrine. It is not enough that a service appears in a tariff. SWBT must prove that the service is competitively offered to customers in the service market area. The establishment that a service market is competitive guards against anticompetitive behavior within that market.

Furthermore, the production of only *two* carrier tariffs in its *Direct Case* raises the question of the status of competition in the access service market. The Commission should require dominant carriers to make specific showings of proof. The Commission should not rely upon a such an inadequate amount of evidence in declaring the competition exists in a certain markets. The production of two tariffs should not substitute a thorough examination of a dominant carrier's ability to improperly exercise market power in a particular market. The Commission should be more cautious in allowing dominant carriers into less than competitive markets, as it could upset the

^{24/} *Designation Order* at para. 15. The Commission noted that SWBT had not described how it reached its conclusion that GST offered a lower priced competitive alternative. *Id.*

development of competition in that market. The Commission should also consider the impact that such improper exercises of market power could have in deterring CLECs and other potential entrants to the access service market. In light of these concerns, the Commission should require SWBT to make a demonstration that its entry will not stifle competitive growth in the access service market.

With respect to the second and the third criteria, SWBT has done nothing to show that the terms of its discounted offerings are reasonably designed to meet competition without undue discrimination or that these discounts will contribute to reasonable rates and efficient services for all users. Specifically, SWBT fails to meet the second prong of the competitive necessity test which requires “the terms of the discounted offering [to be] reasonably designed to meet competition without undue discrimination.”^{25/} Transmittal No. 2633 is discriminatory on its face. The probability that another carrier would require the same set of facilities at the same central office is zero. In other words, the terms, conditions and prices that SWBT offers are only accessible to the individual customer submitting the RFP. Other carriers will be precluded from the lower prices resulting in undue discrimination.

SWBT has failed to prove that its Transmittal No. 2633 meets the competitive necessity test. As a result, SWBT’s proposed tariff must be rejected.

VI. CONCLUSION

GST opposes SWBT’s Transmittal No. 2633 because it violates several Commission rules and policies in addition to threatening the development of competition in the access service market. Specifically, Transmittal No. 2633 fails to comply with the Commission’s long standing requirement

^{25/} *Private Line Guidelines Order* at 948.

that dominant LECs to offer averaged rates throughout their individual study areas. Not only does Transmittal No. 2633 fail to comply with this requirement, but it also fails to fall within any Commission adopted exception. Transmittal No. 2633 blatantly violates the Commission's policy prohibiting dominant LECs from offering contract tariff. Transmittal No. 2633 also violates the Commission's *DS-3 ICB* Order which restricts tariff offerings on an ICB by dominant carriers.

Finally, the Commission's policy to refrain from applying the competitive necessity doctrine to dominant carriers should continue. Commission regulation is still necessary to protect markets not fully competitively developed to prevent anticompetitive behavior. Therefore, the competitive necessity defense should not be available to SWBT. Even if such a defense were available, SWBT's Transmittal No. 2633 fails to meet it. For these reasons, GST respectfully urges the Commission to reject SWBT's Transmittal No. 2633 in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell M. Blau", written over a horizontal line.

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Dated: August 28, 1997

CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that on the 28th day of August, 1997, the foregoing GST's
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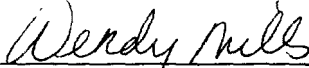
I also certify that a true copy was served via first class, postage prepaid, U.S. mail on
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